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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

WAYMO LLC,

CASE NO. 3:17-cv-00939

14 Plaintiff,

**PLAINTIFF WAYMO LLC'S RESPONSE
TO OTTO TRUCKING LLC'S REQUEST
FOR PERMISSION TO FILE A MOTION
FOR SUMMARY JUDGMENT**

16 UBER TECHNOLOGIES, INC.;
17 OTTOMOTTO LLC; OTTO TRUCKING
LLC.

REDACTED VERSION

Defendants

Judge: The Honorable William Alsup

Trial Date: October 10, 2017

1 Per the Court’s authorization (Dkt. 735), Waymo LLC (“Waymo”) submits this Response
 2 to Otto Trucking LLC’s (“OT”) Request to File a Motion for Summary Judgment (Dkt. 733). OT
 3 seeks to file a premature motion for summary judgment in a bid to escape its discovery obligations
 4 and avoid liability for its contempt of the Preliminary Injunction Order. But, as OT admits, former
 5 Waymo engineer and trade-secret thief Anthony Levandowski is one of two managing members of
 6 OT. (Dkt. 733 at 2.) As this Court has already found, Levandowski “likely” retains possession of
 7 Waymo’s 14,000 stolen files, “evidently to have them available to consult on behalf of Otto and
 8 Uber.” (Dkt. 426 at 7.) So long as Levandowski has possession of Waymo’s stolen trade secrets,
 9 his company OT cannot demonstrate that it is not liable for misappropriation. Further, so long as
 10 [REDACTED] with Levandowski as its manager, factual issues
 11 persist regarding OT’s involvement in and liability for Uber’s patent infringement.

12 **1. There Are Issues Of Material Fact That OT Misappropriated Trade Secrets.**

13 OT’s request to seek summary judgment is futile, because the record is replete with
 14 genuine issues of material fact regarding OT’s misappropriation. Fed. R. Civ. P. 56(c); *Language*
 15 *Line Servs, Inc. v. Language Servs. Associates, Inc.*, 944 F. Supp. 2d 775, 779 (N.D. Cal. 2013)
 16 (standard of review). Misappropriation can involve “acquisition,” “disclosure,” **or** “use” by OT.
 17 18 U.S.C. § 1839(5)(A), (B); Cal. Civ. Code § 3426.1 (b)(1), (2). Because Levandowski is an
 18 agent of OT, his “acquisition” and continued possession of Waymo’s trade secrets is imputed to
 19 OT. *See RESTATEMENT (SECOND) OF AGENCY § 274 (1958).*

20 Moreover, as discussed in Waymo’s Motion for an Order to Show Cause (Dkt. 677),
 21 despite Levandowski’s continued possession of Waymo’s trade secrets, OT refuses to take
 22 reasonable remedial action against Levandowski. (*Id.* at 6-7.) These facts not only demonstrate a
 23 genuine issue of material fact, they are sufficient alone to show a “ratification” of Levandowski’s
 24 misappropriation by OT. Cal. Civ. Code § 2310 (“A ratification can be made . . . by accepting or
 25 retaining the benefit of the act, with notice thereof.”); *Contemporary Servs. Corp. v. Landmark*
 26 *Event Staffing Servs., Inc.*, --- Fed. Appx. ---, 2017 WL 393718, at *1 (9th Cir. Jan. 30, 2017)
 27 (unpublished); *Ajaxo Inc. v. E*Trade Grp., Inc.*, 135 Cal. App. 4th 21, 67-68 (2005).

28 Finally, the little evidence that has been produced regarding OT establishes at least a

1 genuine issue of material fact that it is taking steps to exploit the trade secrets in Levandowski's
 2 possession. Shortly before forming OT, Levandowski confided in other Waymo engineers that he
 3 intended to "replicate" Waymo's long-range LiDAR technology for self-driving trucks. (Dkt. 24-
 4 3 ¶ 27.) OT's interrogatory responses state that [REDACTED]
 5 [REDACTED]. Further,
 6 documents produced by OT demonstrate that [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]. [REDACTED], and OT also
 10 lists a large number of Uber self-driving vehicle engineers on its initial disclosures, as persons
 11 "associated with" OT. Finally, Levandowski has broadly asserted the Fifth Amendment which
 12 justifies an adverse inference against OT. Although OT argues that it "is an entity separate from
 13 Uber," that is only because an [REDACTED]
 14 [REDACTED]
 15 [REDACTED] (Dkt. 515-13 at -7487.) [REDACTED]
 16 [REDACTED]
 17 [REDACTED]¹ All of this raises issues of material fact that OT—with the benefit
 18 of Waymo's trade secrets—is developing long-range LiDAR technology, including for use in
 19 Uber's Spider and/or Fuji systems, [REDACTED]. Thus, a motion for
 20 summary judgment is futile, and will only distract from promptly bringing this case to trial.²

21 **2. There Are Issues Of Material Fact That OT Infringes Waymo's Patents.**

22 The Court should also not permit OT to file a summary judgment motion with respect to
 23

24 ¹ According to the terms set forth in the Term Sheet, [REDACTED]
 25 [REDACTED]. (Dkt. 515-14 at -7524.)

26 ² At a minimum, a motion for summary judgment is inappropriate in light of Waymo's
 27 motion to compel further discovery from OT. (Dkt. 682.) OT has refused to interview its
 28 corporate officers in response to Waymo's interrogatories and has refused to produce documents
 within their custody or control. Appropriate discovery into these matters is likely to reveal "facts
 essential" to justifying an opposition to any summary judgment motion by OT. Fed. R. Civ. P.
 56(d); *Garrett v. City & Cnty. of San Francisco*, 818 F.2d 1515, 1519 (9th Cir. 1987).

1 Waymo's patent claims. OT represents it "has never made, used, offered for sale, sold, or
 2 imported into the U.S. either the Spider or Fuji LiDAR systems." (Dkt. 733 at 3.) But this
 3 argument ignores other bases for finding OT liable for the infringement. For example, it is
 4 possible that OT may be charged with the infringing acts of its agent Levandowski under
 5 principles of "vicarious" liability, or that OT is liable for the infringing acts of Uber under "joint
 6 enterprise" principles in light of the [REDACTED] between OT and Uber.
 7 See *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 797 F.3d 1020, 1022-23 (Fed. Cir. 2015)
 8 (discussing theories of "vicarious" and "joint enterprise" infringement). These fact-intensive
 9 inquiries are ill-suited for summary judgment, particularly, given the uncertain relationship
 10 between OT and Uber and the prominent role of Levandowski at each of OT and Uber. At a
 11 minimum, Waymo's outstanding discovery into the activities of OT and its development of self-
 12 driving car technology renders summary judgment inappropriate. (*Supra* fn. 2.) The Court should
 13 also not permit OT to seek summary judgment while it is in contempt of its obligations under the
 14 Court's Preliminary Injunction Order. (See Dkt. 677 (Motion for Order to Show Cause).)

15 **3. OT's Request Is A Transparent And Desperate Attempt To Circumvent The
 Effect Of The Court's Preliminary Injunction Order.**

16 In its Preliminary Injunction Order, this Court ruled that all Defendants, including OT must
 17 exercise their full authority to prevent Levandowski from exploiting Waymo's trade secrets. (Dkt.
 18 426 at 23 ¶ 2(b).) In response to this Order, Uber terminated Levandowski's employment (Dkt.
 19 519-2), but OT took no similar action. (Dkt. 677 at 5-6.) As a result, Uber—[REDACTED]
 20 [REDACTED]—can continue to benefit from Levandowski's possession of
 21 Waymo's trade secrets by virtue of Levandowski's managing role at OT. Levandowski, in turn,
 22 retains his ability to profit from his [REDACTED]
 23 [REDACTED]. It is therefore no surprise that that OT's request to seek summary judgment followed
 24 closely on the heels of Waymo's Motion to Show Cause (and also Waymo's Motion to Compel
 25 further discovery responses from OT). OT, Uber, and Levandowski are simply attempting to use
 26 creative corporate structuring to game this litigation and avoid the impact of this Court's orders.
 27 This should not be tolerated, and OT's request to seek summary judgment should be denied.
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2 DATED: June 28, 2017

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6 By /s/ Charles K. Verhoeven

7 Charles K. Verhoeven
8 Attorneys for WAYMO LLC

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